

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MIGUEL A. PATINO BRACAMONTES,)	Case No.: 10-CV-03888-LHK
)	
Plaintiff,)	
)	
v.)	ORDER DISMISSING CASE
)	
CHASE HOME FINANCE LLC, et al.,)	
)	
Defendants.)	

Defendants Chase Home Finance LLC, Deutsche Bank National Trust (erroneously sued as Deutsche Bank), JP Morgan Chase & Co., and JP Morgan Chase Bank, NA. (together, Bank Defendants) move to dismiss the complaint in this action for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). *See* Dkt. No. 19 (Bank Defendants’ MTD). Defendant First American Title Company (First American) moves to dismiss the complaint for failure to comply with Fed. R. Civ. P. 8. *See* Dkt. No. 15. The Court set the due date for Plaintiff’s Oppositions to these Motions as December 13, 2010. *See* Dkt. No. 21. However, Plaintiff submitted no opposition. Plaintiff did submit a voluntary dismissal, with prejudice, as to two named defendants, Trina Coffman-Gomez and Integrity Lending, on January 21, 2011. Dkt. No. 26. The Court finds that this matter is suitable for decision without oral argument. Civil Local Rule 7-1(b). Accordingly, the hearing on these Motions, set for February 3, 2011, is hereby VACATED. Because the Court dismisses Plaintiff’s complaint with leave to amend, the Case Management Conference set to follow the February 3, 2011 law and motion hearing is likewise

VACATED. For the reasons set forth below, the complaint is dismissed with leave to amend as specified.

I. BACKGROUND

Although the Complaint omits many relevant facts, the following information can be gathered from the parties' papers and requests for judicial notice. On February 7, 2006, Plaintiff Miguel A. Patino Bracamontes obtained a mortgage loan for \$564,000 secured by real property at 346 High Street, Santa Cruz, California 95060 ("the Property"). The Plaintiff describes this as an "investment home" and the loan documentation lists his residence as a different address. This Primary Loan was recorded with the Santa Cruz County Recorder's office on February 13, 2006. *See* Bank Defendants' Request for Judicial Notice (Bank RJN, Dkt. No. 20) at Ex. 2 (Deed of Trust).¹ The lender identified in the Primary Loan is Long Beach Mortgage Company.

On the same date that he obtained the Primary Loan, Plaintiff also obtained a Secondary Loan in the amount of \$141,000.00. *See* Bank RJN Ex. 3. Like the Primary Loan, the Secondary Loan was also secured by the Property, and also identifies Long Beach Mortgage Company as the lender. *Id.*

About a year later, on February 2, 2007, Plaintiff obtained a Tertiary Loan in the amount of \$360,000.00. *See* First American RJN (Dkt. No. 15) at Ex. 1. The Tertiary Loan identified Sterling Pacific Lending (Sterling) as the lender, and like the other loans, was secured by the Property. *Id.* Plaintiff alleges that he was not fully informed about the terms of the Tertiary Loan before he signed the paperwork, and "never received any statements of payment" for the loan. Compl. at 4. Plaintiff alleges that he "never really knew how or IF the loan was being paid." Compl. at 5. Plaintiff also alleges that an agent for Sterling, Josh Fisher, represented to him that Sterling would provide resources to help finance renovations to the Property. Plaintiff alleges that Sterling did provide some money for contractors, but did not provide "money for materials and such." Plaintiff alleges that as a result of Sterling's failure to pay, he fell behind in payments on the Primary Loan. He alleges that he prepared to file for bankruptcy but canceled these

¹ Defendants make an unopposed request that the Court take judicial notice of a number of documents recorded in the Santa Cruz County Recorder's Office. Because these are public records, they are judicially noticed pursuant to Fed. R. Evid. 201(b).

proceedings because Josh Fisher promised that if he did so, he would “help him complete and sell the house.” Compl. at 6.

Plaintiff defaulted on at least the Primary Loan. On November 14, 2007, a Substitution of Trustee was recorded in the Santa Cruz County Recorder’s Office, stating that Washington Mutual Bank (WaMu), the successor-in-interest to the original lender Long Beach Mortgage Company, substituted California Reconveyance Company as trustee. *See* Bank RJN, Ex. 4 (Substitution of Trustee). A Notice of Default was recorded on July 27, 2009. *See* Bank RJN, Ex. 5. On October 30, 2009, a Notice of Trustee’s Sale relating to the Deed of Trust securing the Primary Loan was recorded. *See* Bank RJN, Ex. 6. A Trustee’s Deed Upon Sale was recorded on March 25, 2010, reflecting that the Property was sold at public auction on March 19, 2010. *See* Bank RJN, Ex. 7.

On July 16, 2010, Plaintiff filed the underlying Complaint in the Superior Court for Santa Cruz County. On August 30, 2010, the Bank Defendants removed the Complaint to this Court on the basis of original federal jurisdiction over the claims arising under federal law. *See* Not. of Removal (Dkt. No. 1).

It appears that named defendants Pacific and WT Capital Lender Services have not been served in this action to date.

II. LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). In deciding whether the plaintiff has stated a claim, the Court must assume the plaintiff’s allegations are true and draw all reasonable inferences in the plaintiff’s favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Leave to amend must be granted unless it is clear that the

complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't. of Corrections*, 66 F.3d 245, 248 (9th Cir.1995).

III. DISCUSSION

The Complaint alleges seventeen causes of action against all defendants, without distinguishing between the actions of different defendants in the various causes of action. The moving defendants seek to dismiss all seventeen causes of action. Plaintiff has failed to oppose defendants' Motions or to file a statement of nonopposition as required by Civil Local Rule 7-3(b).

Of the seventeen causes of action alleged, only five claims implicate federal law. The Court will consider only the asserted federal causes of action in this Order. Unless Plaintiff can amend these federal causes of action to state a claim, the remaining claims arising under state law will be remanded to state court.

a. Code of Federal Regulations

Plaintiff's second claim alleges that he is entitled to an extended right to rescission because he never received any settlement statement. As discussed further below, it appears that there is no longer any right to rescission under the federal Truth in Lending Act (TILA, 15 U.S.C. § 1601 et seq.) regarding any of the loans on the Property. Moreover, Plaintiff has failed to identify any section of the Code of Federal Regulations giving rise to a right of rescission. As a result, this claim is DISMISSED. If Plaintiff wishes to amend this claim, he must point out with particularity which section or statute within the Code of Federal Regulations he believes was violated, the facts giving rise to this cause of action, and which defendant(s) the allegations relate to.

b. Fair and Accurate Credit Act Claim

Plaintiff's seventh claim alleges violation of the Fair and Accurate Credit Transaction Act of 2003 ("FACTA"), Pub. L. 108-159, 111 Stat. 1952 (2003), which amended the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. Plaintiff alleges that his credit score was never disclosed as required by § 212(b) of FACTA. This provision requires "disclosure of credit scores by certain mortgage lenders." However, Plaintiff has not identified which lender failed to provide him a credit score in violation of FACTA, or when this failure occurred. Given that there are three loans from two different lenders potentially at issue based on the Complaint, Plaintiff's pleading is

1 too vague to state a claim. The Complaint must “meet some minimum threshold in providing a
2 defendant with notice of what it is that it allegedly did wrong.” *Brazil v. United States Dept. of*
3 *Navy*, 66 F.3d 193, 199 (9th Cir. 1995). This claim is DISMISSED. Plaintiff is given leave to
4 amend this claim. If he chooses to do so, he must state which defendant allegedly failed to disclose
5 his credit score, and the circumstances giving rise to a duty to disclose it.

6 **c. Violation of 18 U.S.C. § 1962(c) and (d)**

7 Plaintiff’s twelfth and thirteenth claims allege that defendants have violated sections 1962
8 (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (RICO). Without
9 distinguishing between defendants, Plaintiff alleges that they worked together in an “obvious
10 conspiracy” and undertook activities “with the specific intent of furthering the scheme to defraud
11 or with reckless disregard that they would further the schemes to defraud.” Plaintiff alleges that
12 “[t]he scheme was furthered by the preparation and dissemination of false escrow statements, false
13 loan documentation, misrepresentations to Plaintiff regarding the nature of the transactions, as well
14 as preparation of other false and misleading information, each of which constituted mail fraud . . .
15 or wire fraud.” As with Plaintiff’s other claims, this claim appears to have been drafted very
16 generally, without reference to any specific facts relating to Plaintiff’s experience. The few
17 specific facts that do appear in this claim appear to relate to a different case. For example, claim
18 thirteen references a “Downy Savings and Loans,” an entity that appears nowhere else in the
19 Complaint or in any of the loan documentation appended to the defendants’ RJNs.

20 Plaintiff’s claims do not come close to satisfying the heightened pleading requirements for
21 RICO and fraud claims. *See* Fed. R. Civ. P. 9(b). Rule 9(b) “requires a pleader of fraud to detail
22 with particularity the time, place, and manner of each act of fraud, plus the role of each defendant
23 in each scheme. The Ninth Circuit has repeatedly insisted that this rule be followed in RICO
24 actions alleging the predicate act of mail fraud.” *Lancaster Community Hosp. v. Antelope Valley*
25 *Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (internal citations omitted). Particularly since the
26 only specifics mentioned in Plaintiff’s RICO claims appear to be borrowed from an unrelated case,
27 Plaintiff has not stated a claim for RICO violations in either the twelfth or thirteenth claims.
28

Accordingly, these claims are DISMISSED. Plaintiff is given leave to amend these claims, if he can specifically identify the allegedly fraudulent acts and actors giving rise to these claims.

d. TILA and RESPA

Plaintiff's seventeenth claim prays for both rescission and damages as a result of alleged TILA violations. However, it appears that neither remedy is available and that Plaintiffs' claims are time-barred.

i. TILA Damages

TILA damages claims are subject to a one-year statute of limitations, which generally runs from the date the loan documents are executed. 15 U.S.C. § 1640(e); *See Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902 (9th Cir. 2003). Plaintiff's Primary and Secondary Loans were signed February 7, 2006, and his Tertiary Loan was signed on February 2, 2007. But Plaintiff did not file his Complaint until July 16, 2010, over three years and five months after the Tertiary Loan was signed. Therefore, it appears that Plaintiff's claim for TILA damages is time-barred. The one-year bar may be tolled. However, to show that tolling is appropriate, the Plaintiff would need to establish that he could not have discovered his claims before he brought them despite using reasonable diligence. *See Meyer*, 342 F.3d at 902. Plaintiff would need to establish "evidence of undisclosed credit terms, or of fraudulent concealment or other action on the part of [the loan originator] that prevented" him from discovering his claim. *Id.* As pled, the Complaint does not establish any basis for equitably tolling Plaintiff's TILA damages claims. The Ninth Circuit disfavors granting motions to dismiss when equitable tolling is at issue. *Supermail Cargo v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995). Therefore, Plaintiff's seventeenth claim for TILA damages is DISMISSED with leave to amend to establish a basis for equitably tolling such a claim. In addition, if he wishes to amend this claim, Plaintiff must specify which defendant violated TILA and what act or omission caused the violation.

ii. TILA Rescission

The TILA rescission right expires when the property in question is sold. *See* 15 U.S.C. § 1635 ("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first."). The Bank Defendants

1 have submitted a recorded Deed of Sale showing that ownership of the property transferred from
 2 Plaintiff in March, 2010, of which the Court takes judicial notice. Therefore, it appears that
 3 Plaintiff has no right of rescission. Accordingly, Plaintiff's seventeenth claim for TILA rescission
 4 is DISMISSED with prejudice, as any amendment would be futile. *See Lucas v. Dep't. of*
 5 *Corrections*, 66 F.3d 245, 248 (9th Cir.1995).

6 **iii. RESPA**

7 Although Plaintiff's seventeenth cause of action makes passing references to violations of
 8 the Real Estate Settlement Procedures Act or RESPA (12 U.S.C. § 2601 *et seq.*), Plaintiff does not
 9 identify any particular section of RESPA that he claims is violated and makes no specific factual
 10 allegations supporting a RESPA claim. It is not sufficient for Plaintiff to simply state the
 11 conclusion that he believes REPSA was violated. Plaintiff's claim for RESPA violations is
 12 DISMISSED with leave to amend.

13 **e. Dismissal of Defendants JPMorgan Chase & Co. and JPMorgan**

14 The Bank Defendants argue that JPMorgan Chase & Co. and JPMorgan must be dismissed
 15 from this case. As discussed above, WaMu was the successor-in-interest to the original lender
 16 Long Beach Mortgage Company. On September 25, 2008, the Office of Thrift Supervision closed
 17 WaMu and appointed the FDIC as receiver. On the same day, JPMorgan entered into a Purchase
 18 and Assumption Agreement (P and A) with the FDIC. *See* WaMu P and A, *available at*
 19 *www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf* (last accessed January 27, 2011).²
 20 According to the P and A, JPMorgan expressly refused to assume liability for borrower claims
 21 arising from loans made by or acquired by WaMu. P and A § 2.5. Thus, the Bank Defendants
 22 argue that JPMorgan cannot be liable for any claims relating to the Primary or Secondary Loan,
 23 because JPMorgan expressly disclaimed responsibility for such claims when it became the receiver
 24 for WaMu. As the Bank Defendants point out, other courts interpreting the P and A have reached
 25 this conclusion. *See Yeomalakis v. FDIC*, 562 F.3d 56, 60 (1st Cir. 2009); *Hilton v. Wash. Mut.*

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 27 ² The Court takes judicial notice of the WaMu P and A because it is a document published by the
 28 federal government, a matter of public record, and its accuracy "cannot reasonably be questioned."
See Corrie v. Caterpillar, 503 F.3d 974, 978 (9th Cir. 2007) (taking judicial notice of a government
 publication); Fed. R. Evid. 201(b).

1 *Bank*, No. C 09 1191 SI, 2009 U.S. Dist. LEXIS 100441 at *9 n.5 (N.D. Cal. Oct. 28, 2009). The
 2 language of the P and A is clear, and the cited authority is persuasive. The Court finds that
 3 Plaintiff cannot state a claim against JPMorgan for any claims arising out of a mortgage that
 4 JPMorgan acquired through the P and A. Because JP Morgan Chase & Co.'s only relationship to
 5 this matter is as the parent company to JPMorgan (*see* Bank Defendants' MTD at 6), the Court
 6 finds that Plaintiff's claims against JP Morgan Chase & Co. are similarly barred. Accordingly,
 7 both JPMorgan Chase & Co. and JPMorgan are hereby DISMISSED with prejudice.

8 **IV. CONCLUSION**

9 Defendants JPMorgan Chase & Co. and JP Morgan are DISMISSED with prejudice.
 10 Plaintiff's complaint is DISMISSED with leave to amend and DISMISSED with prejudice, as
 11 specified above. Plaintiff shall file an amended complaint, if any, **within 30 days of the date of**
 12 **this Order** to cure the deficiencies discussed herein. Plaintiff may not add new causes of action or
 13 parties without leave of Court or by stipulation of the parties pursuant to Fed. R. Civ. P. 15. If
 14 Plaintiff does not file an amended complaint, the remaining state law claims in the case will be
 15 remanded to the Superior Court for Santa Cruz County.

16 **IT IS SO ORDERED.**

17 Dated: January 31, 2011

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 19 LUCY H. KOH
 20 United States District Judge
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